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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. MARVIN MERCADO, Defendant and Appellant.	B232004 (Los Angeles County Super. Ct. No. BA109494)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Perry, Judge. Affirmed.

John A. Colucci, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Kenneth C. Byrne and David C. Cook, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Marvin Mercado appeals from a jury verdict finding him guilty of eight counts of murder (Pen. Code, § 187, subd. (a))[1] and 10 counts of attempted murder (§§ 664/187, subd. (a)). Additional allegations charging personal use of a firearm (§ 12022.5, subd. (a)) and participation in a criminal street gang (§ 186.22, subd. (b)) were found true. Appellant contends: (1) the trial court erred in failing to find two prosecution witnesses were accomplices as a matter of law; (2) the evidence in support of his convictions was insufficient because the testimony of accomplices was insufficiently corroborated; (3) his right to due process was violated when the court allowed the prosecution to comment on his resistance to extradition; and (4) it was error and misconduct for the prosecutor to comment on the lack of defense evidence about appellant's flight to the Philippines.

We conclude the record supports the trial court's decision to instruct the jury on the principles of accomplice liability rather than finding the two witnesses at issue were accomplices as a matter of law; there was sufficient evidence to corroborate the testimony of accomplices; there was no violation of due process when the prosecutor discussed appellant's extradition from the Philippines; and the prosecutor's statements in closing argument were proper comments on the state of the evidence.

We affirm.

FACTUAL AND PROCEDURAL SUMMARY

Appellant Marvin Mercado was convicted of 18 charges for his involvement in seven separate incidents involving the Asian Boys, a criminal street gang of which appellant was a member. This summary discusses each incident separately.

A. *Valerio Street Murders*

On April 14, 1995, a group of Asian Boys, including appellant, confronted a rival gang, Valerio Street, and began to fire on them. The shootout left two Valerio Street gang members dead from multiple gunshot wounds. The Asian Boys had met prior to the incident to discuss the rivalry and had begun to gather weapons before the crimes were

[1] All further statutory citations are to the Penal Code.

carried out. Appellant was seen shooting at the victims while they lay on the ground. Ammunition and spent casings were found at the scene and were subsequently shown to connect appellant and his fellow Asian Boys to the shootings.

B. *Interstate 10 Freeway Shootings*

On August 1, 1995, a group of Asian Boys was told that members of a rival gang, the Wah Ching, were hanging out in a local coffee shop. Appellant and fellow gang members waited until the suspected rivals exited, then followed their car onto the Interstate 10 Freeway. Appellant drove his vehicle alongside the car carrying the victims while another Asian Boy opened fire. Three occupants of the other car were killed in the shooting. Casings found at the scene were connected to the earlier Valerio Street murders.

C. *Palis Murder*

On August 26, 1995, members of the Asian Boys confronted a group they suspected belonged to a rival gang, Jefrox, outside a Van Nuys arcade. After a brief verbal confrontation, the suspected Jefrox members drove away, and the Asian Boys followed in several cars, one driven by appellant. The Asian Boys opened fire on the victims' cars, causing the death of one of the other men, Oscar Palis. There was testimony from several Asian Boys members, including Ha Trinh. Trinh testified that they planned to confront the rivals and engage in a fistfight only. He detailed the events up until the car he was in lost sight of the victims' cars, prior to the shooting. He stated that appellant was a leader of the Asian Boys and was driving one of the cars on the night of the shootings. Ballistics evidence recovered at the scene was connected to appellant and other Asian Boys members.

D. *Gregory Home Invasion*

On September 20, 1995, appellant and several other gang members carried out a plan to rob the home of the Gregory family. Appellant stole a car and drove the group to the home. After breaking into the house, one of the Asian Boys opened fire, then appellant and a third gang member did so as well. Mr. Gregory was shot at least eight times and died at the scene. The victim's wife testified to the details of the incident.

Ballistics evidence recovered at the crime scene tied the weapons used to appellant and other Asian Boys and to guns used in the Palis murder.

E. *Mata Shooting*

On September 25, 1995, appellant, several Asian Boys, and four women pulled up to a traffic light alongside a car driven by Robinson Mata. Mata's girlfriend was a passenger in that car. Appellant shouted a gang challenge at Mata, and his group proceeded to pursue Mata when he pulled away. Mata was followed to his girlfriend's apartment complex where appellant exited his vehicle and fired shots at Mata. Mata was able to speed through the parking gate but was struck in the chin by a bullet. Marie Punzalan, a member of the Asian Girls, a sister gang to the Asian Boys, was in the vehicle with appellant and said everyone in their group was yelling at Mata's vehicle. She stated she did not participate in or encourage the decision to follow Mata and thought the verbal exchange would be the extent of the incident. Ballistics evidence found at the scene connected the gun used in the crime to appellant.

F. *Sherman Way Shootings*

On March 17, 1996, several younger members of the Asian Boys attended a party. They called older Asian Boys for assistance because they were having trouble at the party with possible gang rivals. Appellant and other gang members met to plan their actions and gather weapons. Appellant went into the party and opened fire on the crowd. One person was shot and killed, and several others were wounded by the gunfire. Appellant also threw a hand grenade into the party. He discussed his involvement in the crime in front of others associated with the gang, expressing his frustration that the grenade did not go off. Several eyewitnesses, including the deceased victim's brother, testified to the details of the incident. Casings found at the crime scene were connected to appellant and other Asian Boys.

G. *Tan Home Invasion*

On February 23, 1996, appellant and a group of Asian Boys carried out their plan to rob the home of Viphear Tan. The group grabbed Tan as he left his home and bound him. They then entered the home, subdued the occupants and stole property belonging to

Tan. One shot was fired into the roof, and a casing recovered at the scene was connected to appellant and other Asian Boys.

A police investigation of the Asian Boys began in 1995. It involved searches of several locations, seizures of vehicles, the gathering of ballistics evidence, and the arrests of many of those involved in the crimes described above. Sometime after the police investigation began, appellant fled to the Philippines. He resided there until he was extradited in 2009.

Appellant was convicted by a jury for his participation in the preceding crimes and sentenced to multiple indeterminate life terms and eight consecutive life-without-possibility-of-parole terms. This appeal followed.

DISCUSSION

I

Appellant contends the trial court committed reversible error in failing to instruct the jury that witnesses Punzalan and Trinh were accomplices as a matter of law to the Mata shooting and the Palis murder, respectively.

Section 1111 provides that a "conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense." When the evidence presented at trial could support a jury finding that a witness was an accomplice of the defendant in the crimes at issue, the trial court "must instruct the jury to determine if the witness was an accomplice." (*People v. Hayes* (1999) 21 Cal.4th 1211, 1271 (*Hayes*).) These instructions must include an explanation of the corroboration requirement and an admonition that the testimony of an accomplice is to be "viewed with distrust." (*Ibid.*; see also *People v. Gordon* (1973) 10 Cal.3d 460, 472 [testimony of an accomplice is to be "viewed with care, caution and suspicion"], disapproved on other grounds by *People v. Ward* (2005) 36 Cal.4th 186, 212.) If the evidence is sufficient to establish that a witness is an accomplice as a matter of law, the trial court is required to so instruct the jury sua sponte. (*Hayes*, at pp. 1271-1272.) However, the determination of accomplice status is generally a question of fact and for the jury to decide. (*Ibid.*) Thus, a court may

decide a witness is an accomplice as a matter of law "*only* when the facts regarding the witness's criminal culpability are 'clear and undisputed.'" (*People v. Williams* (1997) 16 Cal.4th 635, 679, italics added; see also *People v. Avila* (2006) 38 Cal.4th 491, 564-565 (*Avila*).)

Section 1111 defines an accomplice as "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." For both a conspirator and an aider and abettor, liability results not only for the target offense but also any reasonably foreseeable offense committed by the perpetrator. (*Avila*, *supra*, 38 Cal.4th at p. 564.) Appellant argues the evidence established witnesses Punzalan and Trinh were accomplices as a matter of law and the court erred in failing to so instruct the jury. We disagree.

Regarding his claim that Punzalan was an accomplice as a matter of law to the Mata shooting, the evidence cited by appellant was that Punzalan was in the car with him when they approached the victim's car and that it was she who shouted at the victims, "Where are you from?" Appellant argues this gang challenge implicated Punzalan in the subsequent attempted murder carried out by appellant, since the shooting was a natural and probable consequence of such behavior. Appellant relies on Punzalan's membership in and experience with gangs as well as the circumstances surrounding the attempted murder. As stated, a court's obligation to declare a witness an accomplice as a matter of law is triggered only when the pertinent facts, and the inferences to be drawn from them, are undisputed. (*Hayes*, *supra*, 21 Cal.4th at p. 1271.)

The trial court instructed the jury on general accomplice liability. Because appellant failed to request such an instruction, we do not have the trial court's basis for deciding not to instruct the jury that Punzalan was an accomplice as a matter of law. However, viewing the record before us, we conclude the evidence of accomplice status is not strong enough to meet such a high standard. Punzalan testified that everyone in the van was yelling challenges to the victim and that she believed it was nothing more than a verbal exchange. She stated that she did not participate in or encourage the decision to follow the victim. The court was well within the bounds of reason to consider whether

the jury might find her testimony credible and, therefore, find Punzalan was not an accomplice to the attempted murder charge. We find no error with respect to the instructions given regarding Punzalan's testimony.

Appellant also argues Trinh should have been declared an accomplice as a matter of law. He points to evidence that Trinh agreed with others to confront what they perceived as a rival gang and that the natural and probable consequence of his conduct was the shooting of Palis. The circumstances of Trinh's conduct and the inferences to be drawn from them are not undisputed. Although appellant describes the testimony of Trinh as "self-serving" and "disingenuous," the court could reasonably conclude Trinh's accomplice status was a matter for the jury to decide. We find no error.

Additionally, appellant contends even if Punzalan and Trinh were not accomplices as a matter of law, the court failed to properly instruct the jury on the principles of accomplice status because it did not instruct on the natural and probable consequences theory. The failure of a trial court to properly instruct on accomplice liability under section 1111 is harmless error "if there is sufficient corroborating evidence in the record." (*People v. Lewis* (2001) 26 Cal.4th 334, 370.) As we discuss in the following section, we find there is sufficient corroborating evidence with regard to the Mata shooting and Palis murder to render any errors in jury instruction harmless.

II

Appellant argues the evidence before the court was not sufficient to support the convictions because the testimony of accomplices and co-conspirators was not sufficiently corroborated.

Our Supreme Court has stated that evidence is sufficiently corroborative of accomplice testimony if "it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth." (*People v. Fauber* (1992) 2 Cal.4th 792, 834.) The corroborating evidence need not be sufficient to establish every element of the offense charged, but rather "'may be slight'" or even "'entirely circumstantial.'" (*People v. Lewis*, *supra*, 26 Cal.4th at p. 370, quoting *Hayes*, *supra*, 21 Cal.4th at p. 1271.) Appellant argues the evidence of his flight to the Philippines as

indicating consciousness of guilt was insufficient to meet the corroboration threshold because it was not *immediate* flight and it was equally plausible that his "departure" reflected a desire to abandon his gang lifestyle rather than to avoid the investigation. Appellant next argues the remaining evidence with respect to each charge was insufficient on its own to corroborate the accomplice testimony, and that, without corroboration, the accomplice testimony was insufficient to sustain the convictions.

When reviewing a sufficiency of the evidence challenge of a criminal conviction, we review the "entire record in the light most favorable to the prosecution to determine whether it contains evidence . . . from which a rational trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Silva* (2001) 25 Cal.4th 345, 368.) The convictions will thus stand unless there is absolutely no hypothesis upon which they can be supported. (*People v. Cravens* (2012) 53 Cal.4th 500, 507-508.)

While appellant's proposition that his departure to the Philippines could have been entirely innocent, the "jury could reasonably have inferred that [appellant's] flight demonstrated consciousness of guilt." (*People v. Garrison* (1989) 47 Cal.3d 746, 773.) It is well settled that such an inference operates as an "implied admission which may properly be considered as corroborative of an accomplice's testimony." (*Ibid*.; see also *People v. Avila*, *supra*, 38 Cal.4th at p. 563.) Although the exact date is not certain, appellant departed the country sometime after the police investigation began in 1995 and before September 1997, when a deportation order was filed against him in the Philippines. While no exact proximity in time has been set for the inference of consciousness of guilt, the particular facts of each case should be considered. It is true that the longer the lapse before the flight takes place, the weaker the inference of consciousness of guilt is. But the extent of the flight also is critically important. In this case, the flight was not to another town or state, but was halfway around the world. We find no support for appellant's contention that flight must be within days of the crime's commission or the subsequent investigation. Reviewing the record before us, we find the evidence sufficient to support an inference by the jury that the flight indicated

consciousness of guilt and hence adequate to corroborate the testimony of witnesses found to be accomplices.

There also was other evidence that corroborated the testimony. Although the prosecution offered testimony from witnesses who were either declared accomplices as a matter of law by the court or who the jury might have concluded were accomplices, there was additional evidence provided regarding each crime. The jury heard nonaccomplice testimony from Asian Boys and other associates of the gang not connected to the crimes about which they testified, which connected appellant to the incidents. Other witnesses to the incidents as well as some of the surviving victims of the crimes were also heard. Of particular strength, ballistics evidence recovered at the crime scenes was linked to evidence found at locations connected to appellant and his gang, including property owned by appellant's family where officers found hundreds of casings, ammunition boxes, and a photograph of appellant at that exact location. In sum, there is sufficient evidence to corroborate the testimony of witnesses suspected of being accomplices in the commission of the crimes for which appellant was convicted; as a whole, the record provides substantial evidence such that the jury could properly find appellant guilty beyond a reasonable doubt.

III

Appellant contends the trial court erred when it allowed the prosecution to comment on his resistance to extradition. He claims his constitutional right to fight extradition was violated by the court as a result of the error.

The Supreme Court has made clear that punishing a person for taking a course of action that the law clearly allows him to take is a "due process violation of the most basic sort." (*Bordenkircher v. Hayes* (1978) 434 U.S. 357, 363.) Therefore, it is "'patently unconstitutional'" when the State seeks to penalize a person's reliance on his or her legal rights. (*Ibid*.) There are many cases dealing with this issue regarding myriad constitutional rights, including the rights to appeal a conviction, to refuse to testify at one's own trial, and to request a jury trial for any charges made. (See *United States v.*

Jackson (1968) 390 U.S. 570, 582-583; *Griffin v. California* (1965) 380 U.S. 609, 613-615 (*Griffin*); *Blackledge v. Perry* (1974) 417 U.S. 21, 26-28.)

Our Supreme Court has addressed this issue with respect to resisting extradition. (*In re Watson* (1977) 19 Cal.3d 646 (*Watson*).) In *Watson*, the court dealt with a defendant who was denied presentence credits for the time during which he was resisting extradition. (*Id*. at p. 654.) The court specifically held that "[a]ny person arrested and held for extradition or ordered to be extradited has both a federal and state right to test the validity of the arrest and extradition" and denying credit for time spent in jail while resisting extradition "would seriously penalize a person for exercising his right." (*Ibid*.) In *People v. Sutton* (1993) 19 Cal.App.4th 795, a defendant challenged his conviction on due process grounds stemming from the trial court's admission of evidence regarding his resistance to extradition. At trial, the prosecution presented evidence detailing the defendant's arrest for an unrelated offense and his writ to contest extradition. (*Id*. at pp. 798-799.) The evidence included extensive testimony about extradition procedure and specifically about the defendant's actions regarding the extradition proceedings. (*Ibid*.) The reviewing court found that the trial court had "violated due process by admitting the evidence regarding defendant's exercise of his extradition rights." (*Id*. at p. 804; see also 7 Witkin, Summary of Cal. Law (10th ed. 2005) Constitutional Law, § 615, pp. 1006-1007.)

At appellant's trial, the first reference to extradition was in the opening statements when the prosecutor alluded to evidence that appellant fought being brought to trial and that his lawyers in the Philippines made efforts to help him evade extradition. In response, the trial court admonished the jury that the statements regarding extradition and efforts to conceal appellant's identity did not constitute evidence and should be attributed solely to his lawyers in the Philippines not those present in the trial before them. At trial, a lawyer for the Bureau of Immigration in the Philippines testified that appellant was ordered to be deported based on his status as a fugitive from justice. There was no mention of appellant's legal resistance to extradition. Appellant concedes that although the prosecutor continuously mentioned in closing argument the flight to the Philippines as

evidence of consciousness of guilt, he did not specifically mention the extradition proceedings. Appellant argues the combination of these statements, arguments, and evidence unconstitutionally penalized him for exercising his legal right to fight extradition. We disagree.

Appellant's flight to the Philippines in the wake of the police investigation of the various crimes committed was a critical piece of evidence against appellant at trial, used by the prosecution as evidence of his consciousness of guilt. Except for one passing allusion in opening statements, there was no mention during trial of him exercising his legal right to resist extradition, and not one piece of evidence to be weighed by the jury was introduced on the topic. And as to the reference to it in opening statement, the court specifically admonished the jury not to consider the statement as evidence. The difficulty in neatly disentangling appellant's flight from prosecution and the exercise of his right to resist extradition was due in large part to his own conduct. Based on the record before us, we cannot say this resulted in a deprivation of due process.

IV

Appellant contends it was error for the court to allow the prosecution to comment on the lack of evidence explaining appellant's flight to the Philippines. (*Griffin, supra,* 380 U.S. 609.)

In *Griffin,* the United States Supreme Court held that the prosecution may not comment upon the failure of a defendant to testify on his or her own behalf. (*Griffin, supra*, 380 U.S. at pp. 613-615.) However, this rule does not extend to prosecutorial comment on the state of the evidence. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1339-1340.) Unless the defendant is the only one able to do so, the prosecution may comment on the defense's failure to contradict specific pieces of evidence or explain certain evidentiary issues. (*Ibid.*)

The statements at issue were made by the prosecutor during closing argument. The prosecutor referred to appellant's flight to the Philippines and called attention to the defense's failure to present evidence explaining it. The prosecutor then presented his own conclusion that this was evidence of appellant's guilt. Appellant claims this was an

improper comment on his decision not to testify at trial. He argues the only evidence that logically could have been presented to explain the flight was his own testimony, thereby offending the principles in *Griffin*. We disagree.

At no time did the prosecutor make specific mention of appellant failing to testify; references were made to the *defense's* failure to present evidence explaining the flight. The prosecutor was entitled to comment on the state of evidence regarding appellant's flight. As to the conclusions drawn, prosecutors have "wide latitude to discuss and draw inferences from the evidence at trial." (*People v. Dennis* (1998) 17 Cal.4th 468, 522.) There is nothing improper about a prosecutor discussing a defendant's failure to provide logical, material evidence. (*People v. Wilson* (2005) 36 Cal.4th 309, 338.) Although appellant would have been in the best position to explain his reasons for going to the Philippines, there are other methods of explaining one's conduct to the jury or refuting the prosecution's inferences. We find no error.

DISPOSITION

The judgment is affirmed.

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EPSTEIN, P. J.

We concur:

MANELLA, J.

SUZUKAWA, J.